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Mercy and mitigation evidence in murder cases

In a murder case, you should always voir dire potential jurors regarding their attitude about mercy. You need to discover “whether any of the prospective jurors hold any personal, moral, religious or philosophical beliefs, convictions, scruples or opinions which would preclude them from considering the imposition of [mercy] in the event of a conviction, **regardless of the circumstances.**” *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983) [emphasis added].

If at all possible, you should offer evidence regarding mercy during a murder trial. The jury is always instructed on mercy, and if you do not offer any mitigating evidence in favor of mercy, you may be found to be ineffective.

If you have a client with no significant skeletons in their closet and few if any criminal convictions, you should ask the court to bifurcate the guilt phase and the penalty phase. If you client is convicted, then you can call character witnesses to testify on behalf of your client’s argument for mercy. The procedure for the mercy phase of a bifurcated murder trial is discussed in *State v. McLaughlin*, 226 W.Va. 229, 700 S.E.2d 289 (2010).

Mercy voir dire in a murder case

Since juries do the sentencing in the event of a first degree murder conviction, it is very important to determine whether any of the potential jurors in a murder case have a fixed opinion regarding mercy, regardless of the case. Before you ask jurors about their attitudes toward mercy for people convicted of first degree murder, you need to explain to the jury what mercy means. In a first degree murder case, “mercy” means that a person is still serving a life sentence, but he or she will be parole-eligible in fifteen (15) years. W.Va. Code § 62-3-15. You should also describe the parole process, which is detailed in Chapter 92 of the West Virginia Code of State Rules.

If a juror says his or her opinion about mercy “depends” on the circumstances, you will lose a challenge for cause. However, if a juror says that they never believe in mercy **in any circumstance** for a person convicted of first degree murder, the judge should strike that potential juror for cause.

Voir dire in a child sex cases

Some common juror questions regarding child witnesses are: 1) Why would a child lie about sexual abuse; 2) How can a child know so much about sex if s/he has not been abused; 3) Would children lie about sexual abuse; 4) Why would a child fabricate a story of sex abuse?

You can address these questions with the following voir dire questions:

- Based on your experiences, do children lie about important things that happen to them?
- Can a mother cause a child to lie about something important?
- Do you recognize that there are differences in a child's perception and memory of events based upon the child's age?
- Some people think that if more than one child claims to be molested by a person, there must be some truth to their stories. What do you think?
- How many of you believe children always tell the truth?
- Do you believe children are more or less honest than adults?
- Would you automatically believe an adult over a child or a child over an adult who testifies?
- Do you feel just because a child or adult testifies about sexual assault that it must necessarily be true or untrue?
- Do you believe a witness is more or less honest because that witness may be emotional when providing his or her testimony?
- Has anyone here had experience with children who have been influenced by adults?
- Is there anyone here who believes that a child could not be influenced by an adult to say or act in a particular way?
- What do you think should happen to people accused of molesting children?

Voir dire in child sex cases (continued)

- Have you had any job that involved working with infants or young children?
- Do you or a close family member baby-sit for children?
- Who has a child, or is close to a child who is about the age of the complainant in this case?
- Has your contact with children ever involved discussing sexual matters or allegations of sexual abuse?
- Has child development been an area of interest to you?
- Have you taken courses in child development?
- Does anyone feel that the presumption of innocence or burden of proof should be higher or lower because this is a case involving child sexual abuse/assault?
- Does anyone have experience through courses or work with sexual abnormalities?
- Will anyone here have difficulty sitting and listening to testimony of a graphic and sexual nature and discussing it with eleven strangers?
- Does anyone here have any difficulty with my asking questions concerning graphic sexual acts to the complaining witness or other witnesses?
- What is it about the topic of this sexual assault case that you feel might make it difficult for you to listen to the testimony?
- Do you feel that difficulty might make it a problem for you to discuss some of the issues in this case?
- Do you feel because of that difficulty this might not be the case for you?

Credit: <http://texascriminaldefenselawyers.com/defense-of-child-sexual-abuse-cases/>

<http://www.courts.state.md.us/opinions/coa/2007/81a06.pdf>

What to do when a witness that can testify to exculpatory evidence invokes his right to remain silent at trial.

“An exception to the general rule against allowing a witness to take the stand solely for the purpose of exercising his or her Fifth Amendment privilege against self-incrimination may be warranted in cases where the testimony sought to be compelled by a defendant in a criminal case is exculpatory in nature.” Syllabus Point 5, *State v. Whitt*, 220 W.Va. 685, 649 S.E.2d 258 (2007).

“Where a defendant in a criminal case seeks to call a witness to the stand who intends to invoke his or her Fifth Amendment privilege against self-incrimination and the defendant has presented sufficient evidence to demonstrate the possible guilt of the witness for the crime the defendant is charged with committing, the trial court has the discretion to compel such witness to invoke his or her Fifth Amendment privilege in the presence of the jury.” Syllabus Point 6, *Whitt*.

“In making its decision as to whether a witness should be called to the stand for the purpose of invoking his or her Fifth Amendment privilege against self-incrimination, the trial court should consider whether the defendant will be unfairly prejudiced by not allowing the potentially exculpatory witness to invoke this privilege in the jury’s presence.” Syllabus Point 7, *Whitt*.

Background check experts

Watching the State pick apart your expert witness for professional misconduct is a terrible thing. Make sure you research your expert's background before asking the State to pay them thousands of dollars to work on a case. It is important to know any and all negative information about the expert, because the prosecution will likely do their own research on your expert for cross-examination purposes.

Both Lexis and Westlaw have expert witness databases, but using Google and a telephone is another easy way to find out information about an expert. Contact the licensing boards listed on the expert's CV to make sure they are still in good standing and to find out whether they have had any professional complaints filed against them. Any action taken by a licensing board is usually public information and you can get copies of written decisions regarding the expert. Also, you may try calling criminal defense attorneys in the area in which the expert resides and see if they know of any inside information that might be able to be used against the expert on cross-examination.